IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U.
FILED
MAY 16 1975
MICHAEL RODAK, JR., C

No. 74-1229

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Petitioners.

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

BRIEF IN OPPOSITION OF RESPONDENT, THE WESTERN UNION TELEGRAPH COMPANY

WM. WARFIELD ROSS
WILLIAM R. WEISSMAN
C. COLEMAN BIRD
WALD, HARKRADER & ROSS
1320 Nineteenth Street, N. W.
Washington, D. C. 20036

JACK WERNER
LAURENCE SINGER
1828 L Street, N. W.
Washington, D. C. 20036

Attorneys for Respondent, The Western Union Telegraph Company

Of Counsel:

RICHARD C. HOSTETLER
Vice President & General Counsel
THE WESTERN UNION TELEGRAPH COMPANY
One Lake Street
Upper Saddle River, New Jersey 07485

May 1975

Printed by Judd & Detweiler, Inc., Washington, D. C.

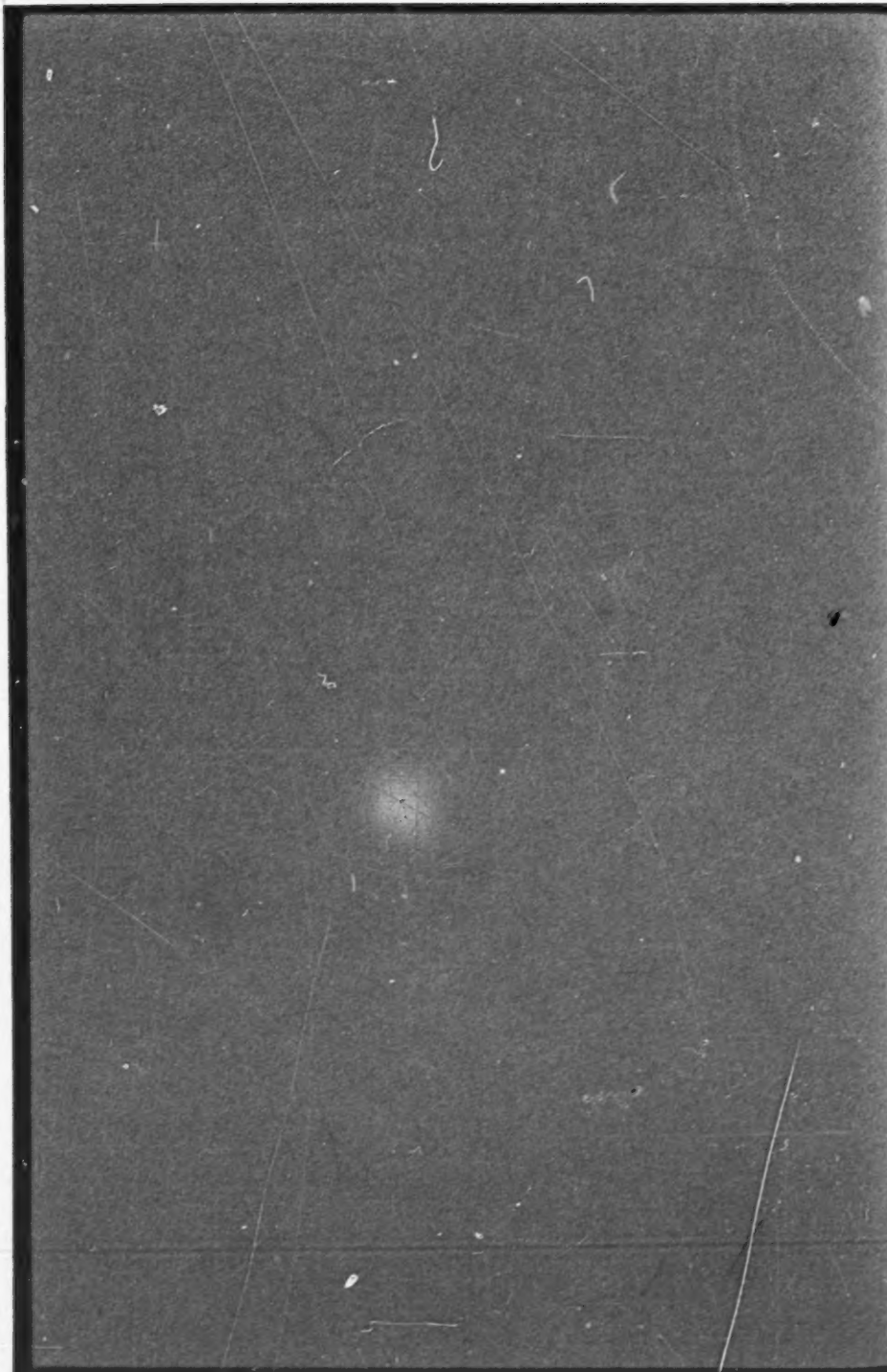

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
1. The Bell-Western Union Contracts	3
2. The Advent of the Specialized Common Carriers	5
3. The Proceedings Below	7
ARGUMENT	9
1. There Is No Conflict of Decision	11
2. The Court Below Correctly Applied this Court's Decisions in *Mobile* and *Sierra Pacific* to the Bell-Western Union Contracts	13
3. The Bell System Was Required to Obtain a Certificate Under Section 214(a) of the Communications Act Before Discontinuing Service to Western Union Covered by the Contracts	18
4. The Continuing Validity of the Bell-Western Union Contracts Is Not of General Importance And Does Not Warrant Review by this Court	19
CONCLUSION	20

TABLE OF AUTHORITIES

CASES:

American Tel. & Tel. Co., 42 F.C.C.2d 654 (1973)	10
American Tel. & Tel. Co., FCC Docket No. 20099, FCC 75-450 (May 7, 1975)	10

Page

American Trucking Ass'ns, Inc. v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397 (1967) 16
Arizona Grocery Co. v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932) 12
Arkansas Natural Gas Co. v. *Railroad Comm'n*, 261 U.S. 379 (1923) 18
Armour Packing Co. v. *United States*, 209 U.S. 56 (1908) 2, 11, 12, 15
Associated Press v. *FCC*, 448 F.2d 1095 (D.C. Cir. 1971) 13
Cincinnati N.O. & T.P. Ry. v. *Chesapeake & O. Ry.*, 441 F.2d 483 (4th Cir. 1971) 12
Cruces Cable Co., 35 F.C.C.2d 707 (1972), *reconsideration denied*, 39 F.C.C.2d 552 (1973) 12
FPC v. *Sierra Pacific Power Corp.*, 350 U.S. 348 (1956) ..... *passim*
Houston Belt & Terminal Ry. v. *United States*, 153 F. Supp. 3 (S.D. Tex. 1957), *aff'd per curiam*, 356 U.S. 23 (1958) 11
Interconnection Facilities for The Western Union Tel. Co., 49 F.C.C.2d 321 (1974) 3
Interconnection Facilities Provided to the International Record Carriers, FCC Docket No. 20452, FCC 75-451 (May 7, 1975) 10
ITT World Communications, Inc. v. *New York Tel. Co.*, 381 F. Supp. 113 (S.D.N.Y. 1974), *appeal dismissed per stipulation*, Nos. 74-2088 & 74-2203 (2d Cir. April 18, 1975) 8, 18
Mackay Radio & Tel. Co., 6 F.C.C. 562 (1938) 5
Microwave Communications, Inc., 18 F.C.C.2d 953 (1969), *reconsideration denied*, 21 F.C.C.2d 190 (1970) 5, 6
Pennsylvania R.R. v. *International Coal Mining Co.*, 230 U.S. 184 (1913) 12
Richmond Power & Light v. *FPC*, 481 F.2d 490 (D.C. Cir.), *cert. denied*, 414 U.S. 1068 (1973) 12

Page

Seatrain Lines, Inc. v. *Pennsylvania R.R.*, 207 F.2d 255 (3d Cir. 1953) 12

Southern Ry. v. *Louisville & N.R.R.*, 185 F. Supp. 645 (W.D. Ky. 1960), *aff'd per curiam*, 289 F.2d 934 (6th Cir. 1961) 11

Specialized Common Carrier Services, 24 F.C.C.2d 318 (1970) 4

Specialized Common Carrier Services, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington Util. Comm'n* v. *FCC*, —— F.2d ——, Nos. 71-2919 & 72-1198 (9th Cir., Jan. 20, 1975) 5

United Gas Pipe Line Co. v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958) 12

United Gas Pipe Line Co. v. *Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) ..... *passim*

STATUTES:

Communications Act of 1934:
Section 201(b), 47 U.S.C. § 201(b) 15
Section 203, 47 U.S.C. § 203 ..... 16, 17
Section 203(c), 47 U.S.C. § 203(c) 15
Section 204, 47 U.S.C. § 204 17
Section 211(a), 47 U.S.C. § 211(a) 4, 11, 15
Section 214(a), *as amended*, 47 U.S.C. § 214(a) 18, 19

Federal Power Act:
Section 205, 16 U.S.C. § 824d 14, 16

Interstate Commerce Act:
Section 2, 49 U.S.C. § 2 ..... 11, 15
Section 6(5), *as amended*, 49 U.S.C. § 6(5) 11, 15

Natural Gas Act:
Section 4, *as amended*, 15 U.S.C. § 717c 14, 16
Section 5(a), 15 U.S.C. § 717d(a) 14

Page

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2325 13

MISCELLANEOUS:

Hearings on Amendments to Title II of the Communications Act of 1934 Before the House Comm. on Interstate and Foreign Commerce, 88th Cong., 2d Sess. (1964) 17

FCC, DOMESTIC TELEGRAPH INVESTIGATION REPORT, FCC Docket No. 14650 (1966) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1229

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*
Petitioners.

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*
Respondents.

BRIEF IN OPPOSITION OF RESPONDENT, THE WESTERN UNION TELEGRAPH COMPANY

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A)[1] is reported at 503 F.2d 1250. The Decision of the Federal Communications Commission (Pet. App. B) is reported at 46 F.C.C.2d 413.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. C) was entered on September 11, 1974. A timely

---

[1] "Pet." refers to the Petition for Certiorari filed by American Telephone and Telegraph Company and the Bell System. "Pet. App." refers to the separately bound appendix to the Petition. "A." refers to the appendix in the court below which has been lodged with the Clerk of this Court. Pet. 5 n.6.

petition for rehearing was denied on October 30, 1974 (Pet. App. D). By order dated January 14, 1975, Mr. Justice Brennan extended the time within which to file a petition for writ of certiorari to and including March 28, 1975, and the petition was docketed on March 28, 1975. By letter dated April 15, 1975, the Clerk extended the time within which the non-federal respondents may file their briefs in opposition to and including May 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the court below erred in holding (a) that, under the Communications Act of 1934, a communications common carrier may not abrogate lawful contractual obligations to furnish service to another carrier in accordance with rates, terms, and conditions specified in such contracts, by means of a unilateral filing with the Federal Communications Commission of tariff schedules containing provisions in conflict with the contracts; and (b) that the facts of the instant case bring it within the doctrine of *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956), rather than *Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908).

STATUTES INVOLVED

The statutes involved are reproduced in Appendix E to the Petition for Certiorari.

STATEMENT OF THE CASE

The Bell System's[2] petition presents two distinct and only marginally related issues. These issues were

[2] In this brief, "AT&T" refers to the Bell parent company, and "Bell System" refers to the entire Bell complex of companies, including AT&T and its 24 operating subsidiaries.

decided by the Federal Communications Commission ("FCC") in a single proceeding, and the FCC's decision was considered and affirmed by the Court of Appeals for the Third Circuit on separate and discrete grounds in the opinion below. One issue (raised in paragraphs 1 and 2 of the Questions Presented in the Petition[3]) is whether the FCC erred in ordering the Bell System to physically interconnect their communications network with those of specialized common carriers.[4] The other issue (paragraph 3 of the Questions Presented[5]) is whether the FCC erred in rejecting Bell System tariffs conflicting with, and designed to abrogate, outstanding exchange of facilities contracts between the Bell System and Western Union ("Bell-Western Union contracts") providing for lease of communications facilities. This brief is directed exclusively to the latter question, which is limited in its significance and effect to these particular contracts and parties.

1. The Bell-Western Union Contracts

The particular contracts here involved have their origin in mutual arrangements for the lease of facilities that date back to the 19th century. The first formal contract between Western Union and the Bell

---

[3] Pet. 3.

[4] The term "specialized common carriers" refers to a carrier that does not provide the full range of common carrier services contemplated by the Communications Act (Pet. App. 7a n.3). For purpose of the agency's interconnection policies, the FCC defined the term to include "non-Bell, non-telephone communications common carriers", which therefore includes Western Union (Pet. App. 3b). *See also* Interconnection Facilities for The Western Union Tel. Co., 49 F.C.C.2d 321, 322 (1974).

[5] Pet. 3-4.

System governing the leasing of facilities was signed in 1909. Standardized forms of contract, first used in 1928, have been modified from time to time, the latest version being the contracts here involved, which became effective January 1, 1970 (Pet. App. 47a, 32b). These contracts were filed with the FCC pursuant to Section 211(a) of the Communications Act of 1934, 47 U.S.C. § 211(a) (Pet. App. 53a n.43, 33b).

The contracts provide for leasing of both local distribution (intra-city) and interexchange (inter-city) facilities by and between the Bell System and Western Union under specified terms and conditions, including fixed price terms.[6] While the contracts impose an obligation on both the Bell System and Western Union to lease facilities to each other upon request, in recent times Western Union has leased a far greater number of facilities from the Bell System companies than the latter have leased from Western Union (Pet. App. 32b; A. 1134). In 1972, Western Union leased from the Bell System approximately 80 percent of its requirements for intra-city distribution facilities and approximately 20 percent of its requirements for inter-city facilities (A. 910).[7]

The contracts permit Western Union to avoid the economic burden on its customers and the adverse

---

[6] There are individual contracts providing for mutual facilities leasing arrangements between Western Union and each of the twenty-four Bell System operating companies, as well as between Western Union and AT&T (for interexchange facilities only).

[7] In 1970, the FCC observed that "Western Union is almost entirely dependent on the Bell System for its local distribution," apparently referring to intra-city facilities. Specialized Common Carrier Services, 24 F.C.C.2d 318, 347 (1970).

environmental impact involved in duplicating Bell's extensive cable network. Such intercarrier arrangements have been encouraged by the FCC since enactment of the Communications Act of 1934.[8] Since the contracts have no fixed term, but are terminable by either party only upon five years' notice (Pet. App. 47a, 32b), both parties, but particularly Western Union, were able to rely, and did rely, upon both the availability of and the cost of leased facilities in planning their communications systems for a reasonable future period.

2. The Advent of the Specialized Common Carriers

The present controversy over the Bell-Western Union contracts stems from the FCC's initiative, commencing in 1969, to open the private-line communications field to competition by allowing new competitive entry. Following its award of construction permits to a new carrier, Microwave Communications, Inc. ("MCI"), to provide private-line service between Chicago and St. Louis in 1969,[9] the FCC in 1971 adopted a policy favoring the entry of such new carriers, and providing that established carriers "should, upon request, permit interconnection . . . on reasonable terms and conditions to be negotiated with the new carriers. . . ." *Specialized Common Carrier Services*, 29 F.C.C.2d 870, 940 (1971) *aff'd sub nom. Washington Util. Comm'n* v. *FCC*, —— F.2d ——, Nos. 71-2919 & 72-1198 (9th Cir., Jan. 20, 1975). The

---

[8] *See* Mackay Radio & Tel Co., 6 F.C.C. 562, 565 (1938); DOMESTIC TELEGRAPH INVESTIGATION REPORT, FCC Docket No. 14650, at 181 *et seq.* (1966).

[9] Microwave Communications, Inc., 18 F.C.C.2d 953 (1969), *reconsideration denied*, 21 F.C.C.2d 190 (1970).

Bell System did not appeal this order (Pet. App. 11a) and thus was faced with the prospect of having to furnish potential new competitors for private-line business with facilities essential for their competitive success. Significantly, it was during the 1969-1970 period that the Bell System and Western Union renegotiated their exchange of facilities contracts, leading to the contracts here involved, which were effective January 1, 1970.

Following the Commission's decision in *Microwave Communications, Inc., supra,* interconnection agreements were negotiated between Bell and MCI. Disputes soon arose between them, however, as to the terms and coverage of such arrangements. MCI claimed that it was entitled to terms, conditions and services no less favorable than those available to the Long Lines Department of AT&T and to Western Union under the contracts here involved. This issue apparently remained unresolved throughout negotiations that continued into the summer of 1973. (Pet. App. 11a.)

Meanwhile, in the fall of 1972, AT&T advised Western Union of its desire to negotiate an upward revision of the rates contained in the Bell-Western Union contracts. These negotiations continued until the late summer of 1973 when AT&T informed Western Union that the Bell System operating companies planned to terminate their respective contracts unilaterally, and file with various state regulatory authorities intrastate tariffs which (rather than the contracts) thereafter purportedly would govern the terms and conditions upon which facilities physically located within those respective states would be leased to Western Union (Pet. App. 47a, 32b-33b; A. 42).

In September, 1973, AT&T and the various Bell System operating companies gave Western Union formal notice of their unilateral termination of the contracts (Pet. App. 47a, 32b; A. 42, 45-47). Although the contracts by their terms are terminable only on five-years' written notice and hence would expire in September 1978, the Bell System contended that when the intrastate tariffs to be filed with the state regulatory authorities became effective, the tariffs would immediately supersede the contracts. From September to November 1973, pursuant to this strategy, the various Bell operating companies filed intrastate tariffs with the state regulatory commissions of more than forty states and the District of Columbia. (A. 42, 1134.)

3. The Proceedings Below

Since 80 to 90 percent of the communications carried over the facilities Bell leased to Western Union are interstate in character, the FCC asserted its paramount jurisdiction over such facilities, and required the Bell System to file with it tariffs essentially comparable to the tariffs Bell had filed with the state agencies (Pet. App. 12a, 6b, 33b).[10] In December 1973, Western Union petitioned the Commission to reject the Bell System's FCC tariff filings, insofar as they purported to apply to facilities and services then covered by the existing Bell-Western Union contracts.[11]

---

[10] Prior to the issuance by the FCC of the decision reviewed below, four state regulatory commissions, over the objections of Western Union, permitted the state tariffs to become effective. After the FCC decision became effective, the Bell System operating companies withheld implementing any additional state tariffs, and raised no challenge in the Court of Appeals to the FCC's assertion of paramount jurisdiction.

[11] Western Union also filed a letter of complaint with the FCC on November 1, 1973, challenging the lawfulness of Bell's filing

The Commission deferred action on the petition, pending completion of the administrative proceeding which is the subject of this review proceeding, and permitted the tariffs to become effective for all users except Western Union (Pet. App. 38b). Following briefing and a full day of oral argument, the Commission issued an order, affirmed by the court below, rejecting the tariffs filed by the Bell System companies insofar as they applied to facilities and services covered by the Bell-Western Union contracts (Pet. App. 32b-40b).

The abrogation of its contracts by the Bell System tariffs would have had a major economic and operating impact on Western Union. Not only would the tariffs have significantly increased the rates charged Western Union as compared to the contract rates, upon which Western Union was entitled to rely for not less than five years following notice of termination (Pet. App. 39b), but the tariffs would also have substantially reduced the kinds of facilities which Western Union would have been able to lease under the contracts (Pet. App. 34b).[12] Consequently, if the tariffs had been permitted to supersede the contracts, Western Union would have been required to undertake a massive emergency modification of its equipment and operating procedures at costs which would necessarily have been passed on to its custo-

---

tariffs with state regulatory commissions whose purported effect would be to supersede the Bell-Western Union contracts (Pet. App. 47a; A. 41-129).

[12] For a description of the changes contemplated by the tariffs see ITT World Communications, Inc. v. New York Tel. Co., 381 F.Supp. 113, 115-17 (S.D.N.Y. 1974), *appeals dismissed per stipulation*, Nos. 74-2088 and 74-2203 (2d Cir. April 18, 1975).

mers and could have affected its viability in competing against the Bell System.

The Bell System appealed the FCC's decision on this issue to the Court of Appeals for the Third Circuit, which affirmed, relying principally upon *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956), and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), for the proposition that the unilateral filing of a tariff did not abrogate a valid intercarrier contract. The court reasoned that the contracts were sanctioned by the Communications Act which, like the Natural Gas and Federal Power Acts involved in *Mobile* and *Sierra*, did not provide a mechanism for much unilateral abrogation.

ARGUMENT

As the court below recognized, its decision (as well as the petition for certiorari) presents two "completely distinct legal issues" (Pet. App. 8a). Whatever the importance of the interconnection issue,[12] the continuing validity *vel non* of these particular Bell-Western Union contracts raises only an issue of limited importance, affecting only these parties, not likely to recur, correctly decided by the Court of Appeals in a unanimous opinion manifesting careful and thorough application of the law to these facts, and not warranting plenary review by this Court.

---

[12] Since the FCC's definition of "specialized common carrier" embraces Western Union (*see* note 4, *supra*), there is no dispute that Western Union is entitled to the same service furnished to other specialized common carriers on equal terms. However, since Western Union, unlike the other non-federal respondents, was not a party to the interconnection dispute, it took no position on the legal merits of that dispute before the Commission or the Court of Appeals, and accordingly refrains from doing so in this Court as well.

The Bell-Western Union contracts are unique and of limited effect. As a practical matter, given the changed circumstances of the present and the future, it is most unlikely that the Bell System will hereafter negotiate individual bilateral contracts with Western Union and the other specialized common carriers where a general unilateral tariff filing applicable to all such carriers could be used. Indeed, the Commission has expressly required that all interconnection arrangements of services and facilities with specialized common carriers and domestic satellite carriers be filed with the FCC as tariffs,[14] and the Bell System has acquiesced in that policy.[15] Further, since the Bell-Western Union contracts will expire in September 1978, pursuant to the various notices of termination given by the Bell System operating companies, the relationship between the Bell System and Western Union will then almost certainly be governed by filed tariffs. Hence, the issue, although substantial between these parties, is of diminishing concern and clearly lacks general importance.

---

[14] *See* Pet. App. 31b, 43b-44b; American Tel. & Tel. Co., 42 F.C.C.2d 654, 660 (1973); American Tel. & Tel. Co., FCC Docket No. 20099, FCC 75-450, at ¶ 5 (May 7, 1975). The FCC has recently initiated a rulemaking proceeding to determine whether this policy should be extended to service provided to international record carriers. *See* Interconnection Facilities Provided to the International Record Carriers, FCC Docket No. 20452, FCC 75-451 (May 7, 1975). Less formal procedures for determining whether to extend this policy to radio common carriers have also been instituted. *See* American Tel. & Tel. Co., FCC Docket No. 20099, *supra* at ¶ 17.

[15] *See* American Tel. & Tel. Co., FCC Docket No. 20099, *supra* n. 14, ¶¶ 12-13. The Bell System did not contend in the court below and does not assert in the petition here that the FCC lacks authority to require the tariffing of intercarrier arrangements.

As shown below, there is no conflict of decisions requiring resolution by this Court, and the court below correctly applied this Court's decisions in *Mobile* and *Sierra* in dealing with the Bell-Western Union contract issue. Accordingly, further review of that issue is not warranted.

1. There is No Conflict of Decision.

Dressed up as a "conflict" ground for review, the Bell System's principal argument is that the decision below is erroneous under *Armour Packing Co.* v. *United States,* 209 U.S. 56 (1908). As the Court of Appeals recognized, however, that case held only that, under Section 2 of the Interstate Commerce Act, 49 U.S.C. § 2, a tariff filing supersedes a private contract between a carrier and a shipper, since private contracts between carriers and shippers are illegal under that Act (Pet. App. 48a-51a).[16] The rule of that case is therefore inapplicable to a tariff filing inconsistent with a valid contract between two carriers, which is entirely lawful under that Act.[17] Thus,

---

[16] The Court of Appeals relied on the analysis of Mr. Justice Harlan, writing for a unanimous Court in *Mobile,* that "the Interstate Commerce Act by its own force precluded contracts for rates different from those applicable to other shippers." (Pet. App. 50a-51a, *quoting* United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 345 (1956).)

[17] Arrangements between rail carriers are governed by Section 6(5) of the Interstate Commerce Act, *as amended,* 49 U.S.C. § 6(5), which was the model for Section 211(a) of the Communications Act, 47 U.S.C. § 211(a), the controlling statute in this case, not Section 2 of the Interstate Commerce Act, 49 U.S.C. § 2, which controlled the outcome in *Armour Packing.* For examples of contracts between railroad carriers, *see, e.g.,* Southern Ry. v. Louisville & N.R.R., 185 F.Supp. 645 (W.D. Ky. 1960), *aff'd per curiam,* 289 F.2d 934 (6th Cir. 1961), Houston Belt & Terminal Ry.

there is plainly no "conflict" between the decision below and *Armour Packing.*[18]

The petition also asserts a conflict in the circuits between the Third Circuit's decision below and the Fourth Circuit's decision in *Cincinnati N.O. & T.P. Ry.* v. *Chesapeake & O. Ry.*, 441 F.2d 483 (4th Cir. 1971). That case involved a statutory action to recover charges under a tariff, which the Interstate Commerce Commission had permitted to become effective, and merely stands for the well-established general proposition, which neither the Third Circuit nor any of the parties here questions, that "a tariff, so long as it is in effect, must be treated as though it has the force of law." *Id.* at 488, *citing Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 197 (1913); *see also Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 386 (1932). A strong argument can be made that the Interstate Commerce Commission's decision permitting a tariff filing inconsistent with a pre-existing contract to become ef-

---

v. United States, 153 F.Supp. 3 (S.D. Tex. 1957), *aff'd per curiam*, 356 U.S. 23 (1958); *cf.* Seatrain Lines, Inc. v. Pennsylvania R.R., 207 F.2d 255 (3d Cir. 1953).

[18] Petitioners argue that the FCC has recognized the applicability of *Armour Packing* to an intercarrier contract in Cruces Cable Co., 35 F.C.C.2d 707 (1972), *reconsideration denied*, 39 F.C.C.2d 552 (1973). As the court below recognized, however, the contract in *Cruces Cable* expressly incorporated by reference a filed tariff, and contemplated that modifications in the tariff rate made from time to time would automatically revise the contract rate accordingly. *See* United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div., 358 U.S. 103 (1958). *Cruces Cable* thus has no bearing on the instant contracts in which the rates are fixed for the contracts' term and not made subject to subsequently fixed changes in tariff rates. *See also* Richmond Power & Light v. FPC, 481 F.2d 490, 493 (D.C. Cir.), *cert. denied*, 414 U.S. 1068 (1973).

fective was erroneous, and that if judicial review had been sought under 28 U.S.C. § 2325, the decision would have been reversed. *See Associated Press* v. *FCC*, 448 F.2d 1095, 1103 (D.C. Cir. 1971).[19] But the railroads that objected to the higher charges contained in the tariff declined to pursue either that remedy, or other administrative remedies open to them, and simply ignored the tariff. 441 F.2d at 489. The case thus upholds the familiar rule that payment for jurisdictional services must be made in accordance with a published tariff in force, until the tariff is set aside. It follows that the lawfulness of the ICC's permitting the tariff to become effective was not before the court. *Id.* at 488. Accordingly, the court's comments with respect to this issue are mere *dicta* of doubtful correctness, and the holding, in any event, does not conflict with that of the court below.[20]

2. The Court Below Correctly Applied this Court's Decisions in *Mobile* and *Sierra Pacific* to the Bell-Western Union Contracts.

Mobile[21] and *Sierra Pacific*[22] involved the question whether unilateral tariff filings could abrogate

---

[19] In that case, the D.C. Circuit noted:

> We recognize, however, that an agency has the power and in some cases the duty to reject a tariff that is demonstrably unlawful on its face. Thus, an agency will reject a tariff that conflicts with the statute, agency regulation or order, or with *a rate fixed in a contract sanctioned by statute* . . . . [448 F.2d at 1103; emphasis added.]

This is the general rule followed by the court below that petitioners seek to have overturned.

[20] Neither the opinion of the Fourth Circuit nor the briefs of the parties mention this Court's decision in United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956).

[21] *Ibid.*

[22] FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

fixed-price contracts under the parallel rate change procedures of the Natural Gas[22] and the Federal Power Acts[24] respectively. This Court held in *Mobile*, first, that the Natural Gas Act contemplates the existence of contracts governing transactions subject to FPC regulation, *i.e.*, that the provision of service under contracts is permitted. Such contracts must be filed with the Commission, and the Act empowers the Commission to investigate their lawfulness under the just and reasonable standard contained in Section 5(a) of that Act, 15 U.S.C. § 717d(a). *Mobile* further held that there is no mechanism in the Act permitting a unilateral tariff filing to change the terms of a contract. Thus, a party entering into such a contract could not avoid its common law contractual obligation merely by filing a tariff with the Commission.[25] Accordingly, the Court in *Mobile* concluded that the common law obligation to perform under the contract or to respond in damages remained unaltered by the Natural Gas Act, and that the unilateral tariff filing was a nullity and must be rejected. 350 U.S. at 347.

Both the FCC and the court below correctly applied the *Mobile* holding to the Bell-Western Union contracts in the context of the Communications Act. As the court below recognized, the critical distinction

---

[22] §4, *as amended*, 15 U.S.C. § 717c.

[24] § 205, 16 U.S.C. § 824d.

[25] This Court's companion *Sierra Pacific* decision held that while the Commission (under the Federal Power Act) had the power to abrogate private contracts, it could exercise that power only where such action is required to serve the public interest, not merely the private advantage of one of the contracting parties. 350 U.S. at 353-55.

between *Mobile* and *Armour Packing* is the provision of the Interstate Commerce Act that precludes contracts between carriers and shippers. Although the Communications Act may be read as also precluding contracts between carriers and customer-users, the Court explicitly held that the Act contains "no . . . directive barring contractual relations between independent carriers. (Pet. App. 51a-52a.) Indeed, such contracts have been commonplace in the communications industry since long before the enactment of the Communications Act. *See* pp. 3-4, 5 n.8, *supra.* Section 211(a) of the Communications Act, 47 U.S.C. § 211 (a), requires, *inter alia,* that every carrier subject to the Act file with the Commission copies of any contract which it makes with another carrier "in relation to any traffic affected by the provisions of this Act to which it may be a party."[26] Further, Section 203(c), requires that carriers must file tariffs with the FCC governing all jurisdictional communications services "unless otherwise provided by or under the authority of this Act."[27]

Sections 211(a) and 203(c), taken together, make it plain that the Communications Act allows communications common carriers to order their dealings in either of two ways: (1) by *contract,* filed under Sec-

[26] As we have already demonstrated (*see* note 17, *supra*), this section was patterned after Section 6(5) of the Interstate Commerce Act, *as amended,* 49 U.S.C. § 6(5), not Section 2 of that Act, 49 U.S.C. § 2, under which *Armour Packing* was decided.

[27] In addition to Section 211(a), Section 201(b), 47 U.S.C. § 201(b), recognized the validity of intercarrier contracts by providing expressly that a common carrier may enter into a contract with any common carrier not subject to the Act "for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest."

tion 211, where the provision of services to other carriers is involved, and (2) by *tariff*, under the procedures of Section 203, where the provision of services to the public is involved.[28] In short, the Communications Act, like the Natural Gas Act, the Federal Power Act, and, indeed, the Interstate Commerce Act, contemplates the provision of service pursuant to private contract; in the case of the Interstate Commerce and Communications Acts, only insofar as service is provided by one carrier to another.[29]

Further, as the court below correctly noted, the rate changing mechanisms of the Communications Act are virtually a carbon copy of those in the Natural Gas Act and the Federal Power Act (Pet. App. 60a). These rate changing mechanisms do not provide statutory authorization for unilateral modification of contracts (Pet. App. 59a-61a). The only distinction that petitioner is able to draw among the three statutory schemes is the authority conferred on the Federal Power Commission by Section 4 of the Natural Gas Act, *as amended*, 15 U.S.C. § 717c, and Section 205 of the Federal Power Act, 16 U.S.C. § 824d, to grant initial regulatory approval of a contract filed with that agency.

---

[28] Petitioners do not challenge this assertion, and, indeed, concede that "under both statutes [the Communications Act and the Interstate Commerce Act] contractural arrangements may exist. . ." (Pet. 36). Under the rationale of *Mobile*, this concession is fatal to petitioners' case.

[29] We do not question that service to other carriers is service to a segment of the public. *Cf.* American Trucking Ass'ns, Inc. v. Atchison, T. & S. F. Ry., 387 U.S. 397, 406-08 (1967). Hence, where a carrier proposes to serve other carriers, the offering carrier has the option of negotiating contracts with its customers or filing a tariff.

To be sure, there is doubt whether the FCC possesses comparable power to review the lawfulness of contracts filed with it pursuant to Section 211(a).[30] Although Bell rests heavily on this possible distinction, it does not explain why the FCC's possible lack of power to review contract rates prior to their becoming effective necessarily creates or implies the power to sanction unilateral abrogation of such contracts after they have become effective. Mr. Justice Harlan's opinion in *Mobile* did not rest on an FPC power to approve or disapprove contracts prior to effectiveness; rather, the Court relied on an absence of statutory intent to prohibit or void the binding effect of common law agreements.

The court below therefore correctly rejected this possible distinction as irrelevant under the *Mobile* rationale and declined to pass on the scope of the FCC's jurisdiction to regulate privately-negotiated contracts. What controlled in *Mobile,* and compels a similar result here, was that Congress had contemplated that rates could be set by private agreement, and that no statutory mechanism was provided for their unilateral abrogation.[31] Hence, the court be-

---

[30] The Commission has previously disclaimed such authority under the Communications Act. *See Hearings on Amendments to Title II of the Communications Act of 1934 Before the House Comm. on Interstate and Foreign Commerce,* 88th Cong., 2d Sess. 12-47 (1964). In 1945, the Commission expressly declared that private intercarrier contracts were not subject to the tariff filing machinery of Sections 203 and 204 of the Act, 47 U.S.C. §§ 203, 204, but reserved decision on the scope of the agency's jurisdiction over such tariffs to an appropriate future instance (A. 488). This uncertainty has never been adjudicated by the courts, and is not directly presented in this case.

[31] A contrary conclusion would raise substantial due process problems presented to, but not reached by, the court below in view

low correctly concluded that the Bell-Western Union contracts were valid and that subsisting common law obligations could not be abrogated by means of a unilateral tariff filing.

3. The Bell System Was Required to Obtain a Certificate Under Section 214(a) of the Communications Act Before Discontinuing Service to Western Union Covered by the Contracts.

The FCC's order reviewed below affirming the continuing validity of the Bell-Western Union contracts made the independent point that implementation of the tariffs would have resulted in discontinuance or impairment of services provided under the contract, and that the Bell System had not sought and obtained from the Commission a certificate under Section 214 (a) of the Communications Act, 47 U.S.C. §214(a), authorizing such discontinuation or impairment (Pet. App. 34b).[32] The court below did not reach this argument (Pet. App. 64a n.53), since it upheld the Commission's order on the alternative ground previously

---

of its disposition of this issue. A taking of Western Union's valuable property rights in its contracts by governmental action for public use must be justified by public interest imperatives, not merely the private interests of a regulated entity, such as the Bell System, in attempting escape from what now appears to it as an improvident bargain. *See* Arkansas Natural Gas Co. v. Railroad Comm'n, 261 U.S. 379, 383 (1923); FPC v. Sierra Pacific Power Co., 350 U.S. 348, 355 (1956).

[32] The pertinent language in Section 214(a) reads:

> . . . No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby. . . .

See also ITT World Communications, Inc. v. New York Tel. Co., 381 F.Supp. 113, 120-21 (S.D.N.Y. 1974), *appeals dismissed per stipulation*, Nos. 74-2088 and 74-2203 (2d Cir. April 18, 1975).

discussed, following this Court's decisions in *Mobile* and *Sierra Pacific.*

There can be no doubt that Section 214(a) applies to a service provided by one carrier to another, since by its terms it applies to all "service" regulated by the FCC. As previously noted,[33] it is equally clear that the abrogation of the contracts by Bell's tariff filing would have resulted in a substantial diminution or modification of the service provided by the Bell System in leasing facilities to Western Union, and hence to the communities of communications customers served by Western Union. The Commission's clearly correct holding that the tariff filings were unlawful under Section 214(a), although not reached by the court below in upholding the validity of the Bell-Western Union contracts, is an additional reason for denying further review.

4. The Continuing Validity of the Bell-Western Union Contracts Is Not of General Importance and Does Not Warrant Review by This Court.

As noted (pp. 7, 10, *supra*), the various Bell-Western Union contracts will expire by their terms in September 1978. It is almost inconceivable that the Bell System would hereafter attempt to negotiate individual contracts with the growing number of specialized carriers in the face of clear FCC policy that intercarrier services be governed by tariffs. Thus, the holding below will not have any bearing on any other transaction regulated by the FCC, and its importance is confined to the ongoing Bell System and Western Union relationship for a limited, definite, and rapidly shrinking future period.

---

[33] P. 8, *supra.*

CONCLUSION

The question whether the Bell System should be required to fulfill its contractual obligations to Western Union has no general importance, and little present and declining future importance to the particular parties. There is no conflict of decisions in the lower courts requiring resolution by this Court. The decision below is plainly correct. Further review of the petitioner's third Question Presented is not warranted.

Respectfully submitted,

WM. WARFIELD ROSS
WILLIAM R. WEISSMAN
C. COLEMAN BIRD

WALD, HARKRADER & ROSS
1320 Nineteenth Street, N.W.
Washington, D. C. 20036

JACK WERNER
LAURENCE SINGER
1828 L Street, N. W.
Washington, D. C. 20036

Attorneys for Respondent,
The Western Union
Telegraph Company

Of Counsel:

RICHARD C. HOSTETLER
Vice President & General Counsel
THE WESTERN UNION TELEGRAPH COMPANY
One Lake Street
Upper Saddle River, New Jersey 07485

May 1975